Mohamed Saleh bin Md Yusof v Zuraini bt Abdul Hamid

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCVC-25–04 OF 2021
AMARJEET SINGH J
10 MAY 2022

Partnership — Existence of partnership — Relevant factors — One of two partners running petrol station died — Surviving partner contended that the partnership still survived because daughter of deceased partner had taken over deceased partner's place in the business under a 'Generation 2' training programme devised by Shell — Whether daughter had in fact quit the programme before its completion and was not issued with retailer's licence to operate a station — Whether daughter in law could not automatically replace her father as partner — Whether partnership stood dissolved under s 35(1) of Partnership Act 1961

The appellant and the respondent's late father ('Hamid') were partners in the running of a petrol station. The appellant had invested RM250,000 in the business and the partners had a retailer licence and agreement with Shell Malaysia Trading Sdn Bhd ('Shell') for the supply of petrol to the station. Under normal circumstances, the partnership — and, consequently, the business — would have ended upon the death of either partner as the retailer's licence and agreement would automatically terminate upon the happening of such event. To address this problem, Shell had come up with a 'Gen-2 programme' that allowed the child of a retailer licence holder, upon fulfilling certain conditions, to obtain a retailer licence in his/her own name and to continue with the business notwithstanding the parent's death. Hamid enrolled the respondent in the Gen-2 programme with the appellant's agreement. Four years after Hamid's death, the appellant sued the respondent in the sessions court claiming that after she took over Hamid's place in the business upon his death, she suddenly resigned as a partner without settling her liabilities to the appellant. The appellant claimed the loss of his capital investment of RM250,000 and loss of profits amounting to RM7,000 per month from the date of filing of the action and continuing. The respondent denied any liability to the appellant, pleading that she had never entered into any agreement or partnership with him to run the petrol station; that although she enrolled in the Gen-2 programme she quit before its completion and did not receive any retailer licence from Shell to run a petrol station. Following a trial, the sessions court dismissed the appellant's action holding that the appellant's partnership with Hamid dissolved upon Hamid's death and that the respondent was never a partner in the business at any time, nor was she liable to meet the appellant's claim. The appellant appealed against the decision.

Held, dismissing the appeal:

(1) By virtue of s 35(1) of the Partnership Act 1961 ('PA'), the appellant's partnership with Hamid dissolved upon the latter's death. The respondent, as an outsider, was not capable in law of taking over her father's place in the partnership, nor did she in fact take over his place (see paras 32 & 35).

(2) The appellant failed to bring his situation within the scope of 'subject to any agreement between the partners' in s 35(1) of the PA to show that the partnership survived Hamid's death. An agreement for a partnership to continue notwithstanding the subsequent death of a partner had to be expressly made by all the partners during their lifetime and such an agreement could only apply if there was more than one surviving partner. If only one surviving partner remained following a partner's death, the partnership could not continue and would stand dissolved by virtue of s 35(1) of the PA. For obvious reasons, the mere fact the appellant had agreed to Hamid's proposal that the respondent take over his place in the business after his death would not bring that agreement within the meaning of the words 'subject to any agreement between the partners' in s 35(1) of the PA (see paras 29–31 & 35).

(3) The appellant could not rely upon s 4(c) of the PA to prove the existence of a partnership with the respondent because he did not prove that the respondent had received a share of the profits of the business in order to thereby show that she was prima facie a partner in the business (see para 40).

(4) The evidence showed that the respondent withdrew from the Gen-2 training programme before its completion, as a result of which Shell did not issue her with a retailer's licence. Without a retailer's licence, the petrol station could not operate and the respondent could not enter into a dealership agreement with Shell. Hence, the appellant's contention that the respondent was qualified under the Gen-2 programme and had taken over her father's place in the business upon his death was not true (see paras 49 & 53).

(5) The appellant failed to show that the trial judge's decision was plainly wrong, or that she had erred in principle or had decided against the weight of the evidence. There was no merit in law or fact that warranted an interference with the trial judge's decision (see para 57).

[Bahasa Malaysia summary

Perayu dan arwah bapa responden ('Hamid') adalah rakan kongsi dalam mengendalikan stesen minyak. Perayu telah melaburkan RM250,000 dalam perniagaan tersebut dan rakan kongsi mempunyai lesen peruncit dan perjanjian dengan Shell Malaysia Trading Sdn Bhd ('Shell') untuk pembekalan

petrol ke stesen tersebut. Dalam keadaan biasa, perkongsian — dan, akhirnya, perniagaan — akan tamat apabila salah satu rakan kongsi meninggal dunia kerana lesen dan perjanjian peruncit akan ditamatkan secara automatik apabila berlakunya kejadian tersebut. Untuk menangani masalah ini, Shell telah mengadakan 'program Gen-2' yang membenarkan anak pemegang lesen peruncit, setelah memenuhi syarat tertentu, bagi mendapatkan lesen peruncit atas namanya sendiri dan meneruskan perniagaan walaupun kematian ibu bapa. Hamid mendaftarkan responden dalam program Gen-2 dengan persetujuan perayu. Empat tahun selepas kematian Hamid, perayu menyaman responden di mahkamah sesyen dengan mendakwa bahawa selepas beliau mengambil alih tempat Hamid dalam perniagaan selepas kematiannya, beliau telah dengan tiba-tiba meletakkan jawatan sebagai rakan kongsi tanpa menjelaskan liabilitinya kepada perayu. Perayu mendakwa kehilangan pelaburan modalnya sebanyak RM250,000 dan kehilangan keuntungan berjumlah RM7,000 sebulan dari tarikh pemfailan tindakan dan berterusan. Responden menafikan sebarang liabiliti kepada perayu, memplidkan bahawa beliau tidak pernah membuat sebarang perjanjian atau perkongsian dengannya untuk mengendalikan stesen minyak; bahawa walaupun beliau mendaftar dalam program Gen-2 beliau berhenti sebelum penyempurnaannya dan tidak menerima sebarang lesen peruncit daripada Shell untuk mengendalikan stesen minyak. Setelah perbicaraan, mahkamah sesyen menolak tindakan perayu dengan memutuskan bahawa perkongsian perayu dengan Hamid dibubarkan selepas kematian Hamid dan bahawa responden tidak pernah menjadi rakan kongsi dalam perniagaan tersebut pada bila-bila masa, dan beliau juga tidak bertanggungjawab untuk memenuhi tuntutan perayu. Perayu merayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan:

(1) Berdasarkan s 35(1) Akta Perkongsian 1961 ('PA'), perkongsian perayu dengan Hamid dibubarkan selepas kematian perayu. Responden, sebagai orang luar, tidak berkemampuan di sisi undang-undang untuk mengambil alih tempat bapanya dalam perkongsian tersebut, malah beliau juga tidak mengambil alih tempat bapanya (lihat perenggan 32 & 35).

(2) Perayu gagal membawa keadaannya dalam skop 'tertakluk kepada mana-mana persetujuan antara pekongsi' dalam s 35(1) PA untuk menunjukkan bahawa perkongsian tersebut terselamat daripada kematian Hamid. Perjanjian untuk perkongsian untuk diteruskan walaupun selepas kematian rakan kongsi perlu dibuat secara nyata oleh semua rakan kongsi semasa hayat mereka dan perjanjian sedemikian hanya boleh digunakan jika terdapat lebih daripada seorang rakan kongsi yang masih hidup. Jika hanya seorang rakan kongsi yang masih hidup kekal selepas kematian rakan kongsi, perkongsian tersebut tidak boleh diteruskan dan akan dibubarkan berdasarkan s 35(1) PA. Atas

sebab-sebab yang jelas, fakta semata-mata perayu telah bersetuju dengan cadangan Hamid bahawa responden mengambil alih tempatnya dalam perniagaan selepas kematiannya tidak akan membawa perjanjian tersebut dalam maksud perkataan 'tertakluk kepada mana-mana persetujuan antara rakan kongsi' dalam s 35 (1) PA (lihat perenggan 29–31 & 35).

(3) Perayu tidak boleh bergantung kepada s 4(c) PA untuk membuktikan kewujudan perkongsian dengan responden kerana beliau tidak membuktikan bahawa responden telah menerima bahagian keuntungan perniagaan untuk menunjukkan bahawa beliau adalah prima facie rakan kongsi dalam perniagaan (lihat perenggan 40).

(4) Keterangan menunjukkan bahawa responden telah menarik diri daripada program latihan Gen-2 sebelum ia selesai, akibatnya Shell tidak mengeluarkannya dengan lesen peruncit. Tanpa lesen peruncit, stesen minyak tidak boleh beroperasi dan responden tidak boleh membuat perjanjian pengedaran dengan Shell. Oleh itu, dakwaan perayu bahawa responden layak di bawah program Gen-2 dan telah mengambil alih tempat bapanya dalam perniagaan selepas kematiannya adalah tidak benar (lihat perenggan 49 & 53).

(5) Perayu gagal untuk menunjukkan bahawa keputusan hakim bicara adalah jelas salah, atau bahawa beliau telah terkhilaf pada dasarnya atau telah membuat keputusan terhadap berat keterangan. Tiada merit dalam undang-undang atau fakta yang memerlukan campur tangan terhadap keputusan hakim bicara (lihat perenggan 57).]

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Khoo Yoke Wah & Ors v Lee Choo Yam Holdings Sdn Bhd & Ors [1991] 1 MLJ 414, SC (refd)

Lee Choo Yam Holdings Sdn Bhd & Ors v Khoo Yoke Wah & Ors [1990] 2 MLJ 431, HC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor [2015] 4 MLJ 525; [2015] 2 CLJ 530, CA (refd)

S Quarry Sdn Bhd v Desaru Development Corp Sdn Bhd & Ors [2019] MLJU 99; [2019] 6 MLRA 350, CA (folld)

Sukhinderjit Singh Muker v Arumugam Deva Rajah [1998] 2 MLJ 117, HC (refd)

Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487, CA (refd)

Legislation referred to

Partnership Act 1961 ss 3(1), 4, 4(a), (c), 35(1)

Chandramaran Paranjodi (Chandramaran & Co) for the applicant.
Fadhil Hazami (Nekoo) for the respondent.

Amarjeet Singh J:

INTRODUCTION

[1] This is an appeal against the decision of the learned sessions court judge at Kuala Lumpur who dismissed the appellant's (plaintiff) action for the recovery of partnership capital invested in a partnership that carried on the business of a petrol station and the loss of profit per month from the business which is still continuing.

[2] For convenience the parties in this appeal will be referred to as they were in the court below.

[3] On 16 March 2022, I dismissed the appeal. This judgment contains the reasons for my decision.

BACKGROUND

[4] The defendant is Zuraini bt Abdul Hamid. The plaintiff, Mohamed Saleh bin Md Yusof and the defendant's late father, Abdul Hamid bin Baba entered into a partnership agreement to carry on the the business of a petrol station. They were the only two partners and carried on the business using the firm name Sykt Hasajaya. The petrol station was situated at No 8339, Jalan Gelanggang, Damansara Heights. It is not disputed that the partnership agreement provided, inter alia:

(a) that the partnership is to continue for the joint lives of the partners;

(b) that the plaintiff's contribution of the partnership capital is 70% while Abdul Hamid bin Baba's contribution is 30%;

(c) that the profits and losses are to be borne according to the proportion of the capital contribution;

(d) that the plaintiff is solely responsible for the finance and banking of the partnership while Abdul Hamid bin Baba is responsible for the management of the petrol station; and

(e) that the partnership will dissolve on the death of any partner.

[5] The plaintiff alleged that the capital investment he contributed was RM100,000 in 1982 in an earlier partnership with Abdul Hamid bin Baba carrying on the same business under the firm name Sykt Hasa at Sg Besi Village. In 1992, when the said petrol station had to make way for development a new partnership with the firm name Sykt Hasajaya was established operating at the present address at Damansara Heights. The plaintiff alleged that the capital investment he contributed for this petrol station was RM150,000. The plaintiff claimed that the whole amount of RM250,000 was paid to Shell Malaysia Trading Sdn Bhd ('Shell'). It is not disputed that to operate the petrol station apart from a retailer licence the plaintiff and Abdul Hamid bin Baba also had to enter into a retailer's agreement with Shell. Only with a retailer's agreement will Shell supply petrol to the petrol station which is then sold to consumers. The plaintiff alleged that his take of the monthly profit made by the petrol station was 70% or about RM7,000 a month.

[6] The retailer's licence will terminate on the death of either the plaintiff or Abdul Hamid bin Baba which event will cause the petrol station business to cease as the retailer's agreement with Shell will also automatically terminate of such event occurring. The retail licence is personal to holder and is not transferable. Thus, to ensure that the business will not cease on his death, Abdul Hamid bin Baba who was already old and whose eye sight was failing, on 5 May 2014 enrolled the defendant in a program initiated by Shell known as the Gen-2 program. This program allows the second generation of a retailer licence holder to obtain a retailer licence in their own name so that the business will not cease. The plaintiff alleged that he had agreed to the proposal.

[7] On 24 January 2016, Abdul Hamid bin Baba passed away. Some four years later, on 15 January 2020, the plaintiff filed an action at the sessions court at Kuala Lumpur claiming from the defendant: (a) the loss of capital investment amounting to RM250,000; and (b) loss of profits of RM7,000 a month from the date of filing the action and continuing to date.

[8] On 14 April 2021, the learned sessions court judge dismissed the action which resulted in the plaintiff filing the instant appeal.

THE AMENDED STATEMENT OF CLAIM

[9] The crux of the plaintifs claim is stated in paras 6–9 of the amended statement of claim. It was pleaded that the defendant was appointed by Shell to take over and had taken over Abdul Hamid bin Baba's place in Sykt Hasajaya on the date of his death under the Gen-2 program. It was pleaded that the defendant suddenly resigned as a partner in Sykt Hasajaya without settling her liability to the plaintiff. As such, the plaintiff claimed the loss of capital

investment and loss of profits amounting to RM7,000 a month, strangely, from the date of filing the action in the sessions court, that is, 15 January 2020, and still continuing.

[10] The date of the resignation was not stated but in his testimony the plaintiff said that the defendant resigned on 3 May 2016.

THE AMENDED DEFENCE

[11] The defendant pleaded that she never entered into any agreement or partnership to run the petrol station business with the plaintiff or ever being appointed by Shell to take over her father's place after his death. She pleaded that she was an employee at the petrol station from 2010 until 2016. The defendant denied ever taking her father's place and therefore there was no issue of any resignation or liablity as alleged by the plaintiff.

[12] The defendant admitted having undergone training with Shell for the Gen-2 program but said that she had withdrawn from the program vide a letter dated 3 May 2016. She pleaded that the Gen-2 program was only for children of persons who were retailers of Shell and that the defendant had applied for the program as a child of a retailer, namely her father, and not as a representative of Sykt Hasajaya.

[13] It was further pleaded that the defendant did not receive any retailer licence under the Gen-2 program as alleged by the plaintiff.

MEMORANDUM OF APPEAL

[14] The learned sessions judge in finding for the defendant held that the partnership of Sykt Hasajaya stood dissolved on 24 January 2016 upon the death of Abdul Hamid bin Baba and that the defendant was never a partner in Sykt Hasajaya.

[15] In the memorandum of appeal the plaintiff stated that the learned sessions court judge erred in fact and in law when she failed to hold that:

(a) the defendant was a partner of Sykt Hasajaya;

(b) there was a partnership agreement between the plaintiff and defendant after the death of her father;

(c) the defendant had terminated the partnership between the plaintiff and defendant; and

(d) as a result of the termination, the defendant was liable for losses claimed by the plaintiff.

[16] It is clear that the matters raised in the memorandum of appeal concern both finding of facts and the law by the trial judge.

The law on appellate interference

[17] The function of the appellate court is stated in a plethora of cases. It suffices to cite the following cases for the relevant principles. The Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 stated that:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[18] Next is the Federal Court decision in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where it was said that 'insufficient judicial appreciation of evidence' concerned the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[19] In this regard the decision of the Court of Appeal in *S Quarry Sdn Bhd v Desaru Development Corp Sdn Bhd & Ors* [2019] MLJU 99; [2019] 6 MLRA 350 is instructive. There it was stated that:

> [14] A plainly wrong decision happens when it can be shown that there is insufficient judicial appreciation of evidence by the trial court. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considered that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

DELIBERATIONS AND DECISION

[20] The plaintiff's submissions can be summarised as follows: that the learned sessions court judge was plainly wrong in not concluding that the defendant had continued the partnership with the plaintiff by taking Abdul Hamid bin Baba's place on 24 January 2016 upon the latter's death and had not considered the oral and documentary evidence presented to the trial court which evidence established that the defendant had carried on a partnership with the plaintiff from 24 January 2016 until 3 May 2016.

[21] On the other hand, the defendant submitted that the learned sessions court judge did not err in fact or in law in holding that the partnership of Sykt Hasajaya dissolved upon the death of her father and there was no continuation of partnership as argued by the plaintiff. The defendant also submitted that the learned sessions court judge was correct, in fact and in law, when holding that the defendant did not enter into any partnership agreement with the plaintiff nor take the place of her father as a partner in Sykt Hasajaya and therefore no issue of liability to the plaintiff arises.

THE ISSUES

[22] Thus, the issues to be determined in this appeal are:

(a) whether the partnership between the plaintiff and Abdul Hamid bin Baba stood dissolved on 24 January 2016 upon the death of the latter;

(b) whether there was a partnership carried on between the plaintiff and defendant on 24 January 2016 arising from the Gen-2 program; and

(c) if found that a partnership was existing, whether the plaintiff is entitled to the reliefs sought.

[23] In considering the submissions made by the parties I had to meticulously consider the documentary evidence before the trial judge, the evidence of the witnesses and the grounds of judgment of the trial judge. I found the following undisputed and/or admitted facts:

(a) in 1982 the plaintiff and the defendant's father entered into a partnership with the firm name Sykt Hasa at Sg Besi Village;

(b) in 1992, on relocating to Jalan Gelenggang, Damansara Heights a new partnership was established with the same terms and conditions, now, with the firm name Sykt Hasajaya;

(c) that there was a retailer licence, in the name of Abdul Hamid bin Baba and the plaintiff, to operate the petrol station in Damansara Heights and a retail agreement with Shell for the supply of petrol to run the petrol station;

(d) the retailer licence terminates on the death of a partner;

(e) the retail agreement with Shell also terminates on the death of one of the partners;

(f) at all material times, there was no written partnership agreement between the plaintiff and the defendant; and

(g) under the Gen-2 program a child of a person holding a retail licence, upon fulfilling all the stipulated conditions, is entitled to be granted a retailer licence to keep the business started by his or her parents going.

The law on partnerships

[24] I begin with the relevant provisions of the Partnership Act 1961. Section 3(1) provides the definition of a partnership:

> Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

While s 35(1) provides what will happen on the death of a partner in the following words:

> Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

[25] In *Sukhinderjit Singh Muker v Arumugam Deva Rajah* [1998] 2 MLJ 117 the High Court followed the interpretation of s 35(1) given by Anuar J in *Lee Choo Yam Holdings Sdn Bhd & Ors v Khoo Yoke Wah & Ors* [1990] 2 MLJ 431, and which interpretation was upheld by the Supreme Court in *Khoo Yoke Wah & Ors v Lee Choo Yam Holdings Sdn Bhd & Ors* [1991] 1 MLJ 414:

> The meaning of the section is clear. As between the partners, the partnership is dissolved by the death of a partner. However, this would be subject to any agreement to the contrary between the partners. The death of a partner in the eye of the law leads to the total dissolution of the partnership unless the partners have expressly provided to the contrary by their agreement. Hence the burden of proving the existence of such an agreement to show that the partnership is not dissolved is on the party who asserts it.
>
> In my view upon the true construction of s 35(1) of the Partnership Act the agreement made between the partners to the contrary must have been made before the death of any partner. An agreement made by the surviving partners after the death of a partner without the agreement of the deceased partner will not bind the deceased partner nor, in my view, will it make the partnership a continuing partnership. This is so because by the death of the partner it is no longer possible to adhere to the original contract, the essence of which must be that all parties to it must be alive.

[26] To prove an agreement to the contrary, the party who asserts must prove not the existence of an agreement between the surviving partners but the existence of an agreement to the contrary between all the partners including the deceased partner. In the absence of such evidence the partnership shall stand dissolved by virtue of s 35(1) (Court of Appeal in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja*

Hussin [1997] 2 MLJ 487).

[27] In the instant appeal the submissions made by the plaintiff can be broadly discussed under three main headings as shown below.

Whether the partnership has continued or stands dissolved?

[28] The first submission was that the learned sessions court judge erred in fact and in law in not holding that the partnership Sykt Hasajaya has continued between the plaintiff and defendant on 24 January 2016. I found this submission devoid of merit for the following reason.

[29] The law concerning s 35(1) of the Partnership Act 1961 is trite: the death of a partner results in the dissolution of the partnership unless the partners have expressly agreed to the contrary during their lifetime. The agreement to the contrary is for the partnership amongst the surviving partners to continue notwithstanding the subsequent death of one partner.

[30] In my view, under s 35(1), an agreement for a partnership to continue is applicable only in the situation where there is more than one surviving partner who together continue the partnership, meaning that only the surviving partners can continue the partnership. However, in a situation where there is only one surviving partner, such as in the instant appeal, the partnership cannot continue. The only one and surviving partner is incapable in law of continuing the existing partnership. This is because the definition of 'partnership' is an association of two or more persons carrying on business in common with a view of profit.

[31] In this appeal, the plaintiff testified that Abdul Hamid bin Baba told him that he wanted the defendant to take over from him under the Gen-2 program and the plaintiff had agreed to this proposal. It was further testified that the defendant had taken her father's place in the partnership on 24 January 2016 when Abdul Hamid bin Baba passed away. In my judgmnent, such proposal by Abdul Hamid bin Baba and acceptance by the plaintiff would not fall within the meaning of the words 'subject to the any agreement between the partners' in s 35(1) as explained in the preceding paragraph. In the circumstances the partnership with the firm name Sykt Hasajaya could not in law continue on the death of Abdul Hamid bin Baba.

[32] The reason is obvious and based on the law on partnerships. The defendant is an outsider to the partnership between the plaintiff and Abdul Hamid bin Baba. The defendant remains an outsider notwithstanding the fact that Abdul Hamid bin Baba is her father or even if there is an agreement to join the partnership. The defendant cannot just step into the shoes or take the place

of a deceased partner and continue the existing partnership. That partnership stands dissolved on the death of Abdul Hamid bin Baba.

[33] Further, the contention that a partnership existed because the defendant had on 24 January 2016 taken her father's place in Sykt Hasajaya is against the evidence given by the plaintiff himself. This is clearly seen in the following testimony of the plaintiff in his witness statement:

> Soalan: Apa terjadi selepas itu?
>
> Jawapan: *Setelah bapanya meninggal dunia* pada 24 Januari 2016, saya telah mengadakan suatu mesyuarat dengan Puan Zuraini bt Abdul Hamid dan keluarganya untuk berbincang *samada Puan Zuraini bt Abdul Hamid ingin mengambil alih tempat mendiang bapanya di Sykt Hasajaya* (No. Sykt 562914).
>
> Puan Zuraini bt Abdul Hamid bersama keluarganya secara sebulat suara telah menyatakan *persetujuan bahawa Puan Zuraini bt Abdul Hamid akan mengambil alih tempat mendiang bapanya di Sykt Hasajaya* (No. Sykt 562914).

[34] The above testimony is proof that the plaintiff only began asking whether the defendant intended to join Sykt Hasajaya as a partner after the death of Abdul Hamid bin Baba. This meeting as will be shown by the plaintiff's testimony took place on either 28 April 2016 or 29 April 2016.

[35] Therefore, the evidence shows that the plaintiff had failed to bring his situation within the scope of 'subject to the any agreement between the partners' as required by s 35(1) of the Partnership Act 1961. The learned sessions court judge was therefore correct in arriving at the conclusion she did. Sykt Hasajaya did not continue as a partnership nor was the defendant capable in law in taking her father's place in an existing partnership and neither did the defendant in fact take her father's place. Hence, Sykt Hasajaya stood dissolved on the death of Abdul Hamid bin Baba by virtue of s 35(1) of the Partnership Act 1961.

Whether there was a partnership by virtue of s 4(a)?

[36] The plaintiff's second submission, was that the plaintiff and the defendant had entered into a partnership relationship without there being a written agreement between the two parties. To prove such a relationship the plaintiff relied on para (c) of s 4 of the Partnership Act 1961 which provides as follows:

> In determining whether a partnership does or does not exist, regard shall be had to the following rules:
>
> (c) the receipt by a person of a share of the profits of business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment

contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular —

(i) the receipt by a person of a debt or other liquidated amount, by instalments or otherwise, out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

(ii) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;

(iii) a person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not, by reason only of such receipt, a partner in the business or liable as such;

(iv) ...

[37] With regard to para (c) of s 4, it is useful to refer to the decision of the Court of Appeal in *Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor* [2015] 4 MLJ 525; [2015] 2 CLJ 530 where it is said as follows:

> [26] It is also an accepted proposition in law that in assessing whether a partnership exists, the court has to consider the intention of the parties, and in the absence of a written agreement, reliance has to be placed on the provisions of the Partnership Act 1961: ... the sharing of profits, in the context of a partnership, is a very relevant indicia, and this is recognised in s 4 of the Partnership Act 1961.

[38] Paragraph (c) of the s 4 is a statutory avenue provided to determine a dispute on the existence of a partnership relationship which is denied by one party. In such a dispute a written partnership agreement does not exist. If the criteria stated in the para (c) of s 4 is established ie that the person denying such relationship was in receipt of profits from a business — prima facie evidence of a partnership relationship arises.

[39] The plaintiff in this appeal, instead of showing the requisite proof required merely made the following two statements in the attempt to satisfy the para (c) of s 4 (para (m) at p 14 of *hujahan bertulis pihak perayu*):

(a) Pihak Responden telah mengambil alih tempat mendiang bapanya di Syarikat Hasajaya (No. Sykt: 000919397-M) iaitu sebagai salah seorang rakan kongsi di Syarikat Hasajaya (No. Sykt: 000919397-M);

(b) Syarikat Hasajaya (No. Sykt: 000919397-M) adalah syarikat perkongsian bersama di mana kedua-dua pihak akan membahagikan keuntungan syarikat tersebut sesama sendiri.

[40] These two statements do not amount to nor make up the indicia stipulated in para (c) of s 4. The statements are not proof of receipt of profits.

In my judgment, para (c) of s 4 requires the plaintiff to prove by evidence the receipt of profits by the defendant. If there is such proof, only then, the evidential burden shifts on the defendant and this court will be in a position to assess the evidence and arrive at a finding of fact whether or not a partnership existed between the plaintiff and the defendant. The plaintiff has clearly not led any such evidence and in absence of such evidence has failed to trigger para (c) of s 4. The submission of the plaintiff is therefore devoid of merit.

Whether the defendant was a partner in Sykt Hasajaya?

[41] The plaintiff submitted that the learned sessions court judge had failed to consider the evidence adduced by the plaintiff's witnesses which had established that the defendant had undergone the Gen-2 program and taken her father's place in Sykt Hasajaya when the latter passed away on 24 January 2016. The plaintiff reproduced excerpts from the notes of proceedings which he contended supports his submission. I found the submission of the plaintiff devoid of merit. My reasons are as follows.

[42] It suffices to say that the law discussed under the heading of 'whether the partnership has continued or stands dissolved?' (paras 24 to 27 above) applies with equal force against the plaintiff's submission. I had shown in the above-mentioned paragraphs that by virtue of s 35(1) read with the definition of 'partnership', the partnership of the plaintiff and Abdul Hamid bin Baba under the firm name Sykt Hasajaya dissolved on the death of Abdul Hamid bin Baba and that the defendant was incapable in law to take her father's place and continue the partnership with the plaintiff. The testimony by the plaintiff that by virtue of having undergone training under the Gen-2 program the defendant had taken her father's place in Sykt Hasajaya is against s 35(1) of the Partnership Act 1961.

[43] According to s 35(1), a partnership is dissolved on the death of a partner except where there is an agreement to the contrary entered into by the partners before the death of any partner. If such agreement exist only the surviving partners can continue the partnership. The exception provided in s 35(1), as shown above, does not apply to the facts of this appeal. The witnesses' evidence cannot change the fact that the defendant is incapable in law to take her dead father's place as a partner in Sykt Hasajaya which stands dissolved as at 24 January 2016. Further, s 35(1) which is enacted by Parliament cannot be modified by the Gen-2 program.

[44] I further found, after considering the totality of the evidence in the appeal record, that the evidence of the witnesses alleging that the defendant was

a partner of Sykt Hasajaya is made without any basis, or is contradicted by the undisputed or admitted facts, or is refuted by the plaintiff's own independent witness.

[45] The first alleged fact relied by the plaintiff is his own evidence appearing in his witness statement. The plaintiff stated that the defendant *had completed* the two years training at Shell and Sykt Hasajaya under the Gen-2 program and *became qualified* to take her father's place upon his death and *did take her father's place* on 24 January 2016 as partner in Sykt Hasajaya (question and answer 22 and 24 at pp 145–146 *rekod rayuan bahagian B*). This statement of the plaintiff is a mirror image of his pleaded case.

[46] I found that plaintiff's evidence soundly contradicted by undisputed and independent evidence of the fourth witness called by him who is Shell's manager for the State of Selangor and the person in charge of the Gen-2 program involving the defendant ('SP4').

[47] It is necessary at this point to digress and state what the Gen-2 program is and what exactly does the program entail. SP4 in his evidence in chief stated that the Gen-2 program was an initiative of Shell which was approved with conditions by the Ministry of Domestic Trade and Consumer Affairs. The program was established as a result of the many ad hoc applications being made by parents who wanted their children to take over the petrol station business run by them. This is because a retail licence to operate a petrol station would terminate on the death of the licence holder and also terminate the exisiting dealership agreement with Shell resulting in the closure of the petrol station. The Gen-2 program is a method for the second generation of existing retailers being granted retailer licences in their own names to take over the petrol station on the retirement or death of their parents.

[48] The Gen-2 program regulated the granting of the retailer licences to the second generation. The conditions to be satisfied under this program are: (i) that only one child who is not working or carrying out any other business is eligible to apply; (ii) an age limit to apply; (iii) the child must work at the petrol station on a full-time basis for two years and in this time attend a start up course at Shell; and (iv) pass an interview at Shell. Only upon all these conditions being fulfilled can the said second generation candidate obtain a retailer licence in his or her own name. The Gen-2 program provides two years of training at the petrol station and includes a start up course at Shell. In these two years officers from Shell will make visits to the petrol station to evaluate the candidate who must be able to carry out the work of managing the petrol station.

[49] Returning to the analysis of the evidence, I found that the defendant began working at the said petrol station from November 2010. According to SP4, the defendant enrolled in the Gen-2 program on 5 May 2014. This means that the two years training under the program would end on 4 May 2016. The defendant's father passed away on 24 January 2016. On that date the defendant had yet to fulfill the requirements and had still some three months more to complete the program. Therefore, the evidence of the plaintiff that the defendant was qualified and taken her father's place on 24 January 2016 is not true. The defendant had yet to complete the two years training when her father passed away and SP4 confirmed that the defendant was no longer in the Gen-2 program after her withdrawal from the same on 3 May 2016. SP4 also confirmed that the defendant did not receive a retailer licence under the Gen-2 program. Without the retailer licence there was no second generation to continue the petrol station and enter into a retailer agreement with Shell. Thus, the alleged fact was not established and not true.

[50] The second alleged fact was that the defendant was a partner of Sykt Hasajaya since 24 January 2016. This is the testimony given by the plaintiff and repeated by the tax consultant ('SP2') who did the book keeping and tax returns for Sykt Hasajaya to the effect. I found this allegation without basis and against s 35(1) of the Partnership Act 1961. The alleged fact was also contradicted by the plaintiff's own testimony in his witness statement (paras 33 and 34 (above) and question and answer 23 and 24 at pp 145–146 *rekod rayuan bahagian B*).

[51] In his witness statement the plaintiff said that he had a meeting with the defendant and her family after the death of Abdul Hamid bin Baba. The purpose of the meeting was to find out whether the defendant intended to take over her father's place in Sykt Hasajaya. The plaintiff said that the defendant answered in the affirmative. In cross-examination, the plaintiff said that the said meeting took place some four to five days before the defendant resigned. The plaintiff had earlier made the allegation that the defendant resigned on 3 May 2016. This testimony establishes that the meeting took place either on 28 April 2016 or 29 April 2016 and that the defendant did not take her father's place or more accurately was not a partner in Sykt Hasajaya on 24 January 2016 nor was she a partner of Sykt Hasajaya on 28 April 2016 or 29 April 2016.

[52] The third alleged fact is the answer of the defendant in cross-examination agreeing that the petrol station had to be returned to Shell because she resigned as a partner of Sykt Hasajaya (p 133 *rekod rayuan bahagian B*). In my assessment of the totality of the evidence this admission of the defendant does not make the defendant a partner as the admission cannot stand with the rest of the defendant's evidence and the evidence of SP4.1 found the answer equivocal in that the defendant had continuously maintained that

she had never entered into any partnership with the plaintiff and refused to enter into any partnership with the plaintiff. Equally important is SP4's evidence that no retailer licence was ever issued to the defendant under the Gen-2 program which meant that there can no longer exist a business of operating a petrol station or obtaining a dealership with Shell. The petrol station can only operate if the defendant had obtained a retailer licence. It is only in the event the defendant obtains a retailer licence that a partnership can be entered into between the plaintiff and defendant. Further, as shown above, Sykt Hasajaya stood dissolved on 24 January 2016 when Abdul Hamid bin Baba passed away.

[53] In this regard the evidence of SP4, which was ignored by the plaintif, is illuminating and explained what happened from the time Abdul Hamid bin Baba passed away on 24 January 2016 until the day the petrol station was handed back to Shell on 1 September 2016. According to SP4, the death of Abdul Hamid bin Baba resulted in the retailer licence being terminated which includes the retailer agreement with Shell. The petrol station did not close because the plan was for the defendant to obtain a retailer licence under the Gen-2 program and continue the petrol station as second generation. However, the plan did not materialise with the defendant withdrawing from Gen-2 program on 3 May 2016. SP4 testified that with withdrawal the defendant could not and did not receive a retailer licence. Without the retailer's licence, not only the petrol station could not operate the defendant could also not enter into a dealership agreement with Shell. The corollary was the winding down of the petrol station before being handed back to Shell.

[54] SP4 further testified that the petrol station after the death of Abdul Hamid bin Baba did not cease operations as it should have because Shell had obtained permission from the Ministry of Domestic Trade and Consumer Affairs to allow the petrol station to operate until a replacement was found to take over the petrol station so that there is an adequate supply of petrol for the Damasara Heights area. The replacement was to have been the defendant who was on course of obtaining a retailer licence upon completing the Gen-2 program but upon her withdrawal on 3 May 2016 another replacement had to be found (p 110 *rekod rayuan bahagian B*). The petrol station was then allowed to wind down until a new replacement was found.

[55] The evidence that established these facts are found in the following excerpts of the testimony given by SP4. I begin with the testimony at p 105 *rekod rayuan bahagian B*:

> ... Dan bermula pada 5 May 2014 itu, bermula program Gen-2 itu tetapi selepas Allahyarham Hamid meninggal dan apabila saya berjumpa Jun dengan En Saleh, 3 May 2016, Pn Jun sebab masa itu, Allahyarham Hamid tak ada, jadi, saya pun bertanya, kita ini, sebenarnya *license ini dah automatically tiada sebab pengusaha dah*

meninggal. Tapi kami dah hantar kepada KPDM; Kementerian Perdagangan *untuk melanjutkan tempoh sebab kami memang dibenarkan untuk melanjutkan untuk memastikan continuos supply kawasan itu.* Kalau stesen itu terus tutup, pengguna tiada supply. So, in extended, Mei, di mana saya cakap Jun, so, now kita nak in a way officialize Gen-2, kita appoint you as our retailer sebab you dah mematuhi semua syarat-syarat itu, pada hari itu, 3 May 2016, apabila En Saleh datang dengan Jun berjumpa dengan saya, dan pegawai saya, kami ingat perjumpaan itu adalah untuk menerima program Gen-2 ini pada Pn Jun tetapi pada 3 May 2016 Pn Jun sebenarnya telah menghantar surat kepada Shell untuk withdraw *diri dia daripada menjadi retailer. Maknanya program Gen-2, tak ada.*

Followed with the testimony at p 107 *rekod rayuan bahagian B*:

PP: Lepas dia meninggal dunia, Allahyarham Hamid meninggal dunia, pada 24 January 2016, siapakah yang telah menguruskan perniagaan stesen minyak itu?

SP4: Pn Zuraini.

PP: Okay. Pn Zuraini yang menguruskan.

SP4: Pn Zuraini menguruskan tetapi masih Sykt Hasajaya, ya. *So, tidak berlaku apa-apa penukaran. Masih under Hasajaya,* dan pihak Shell memberitahu Kementerian Perdagangan because technically apabila seorang partner itu meninggal, *dalam kontrak kami, apabila seorang partner itu meninggal, that contract automatically terminated. Itu dalam kontrak kami,* apabila kontrak itu partnership, apabila seorang partner meninggal, maknanya kontrak itu terbatal.

PP: Okay. Setuju tak andai

SP4: Tapi memandangkan kami mempunyai obligation to serve the community, because kita kena pastikan tidak ada keputusan bekalan pada warga Damansara Height di situ, *jadi kami tulis kepada KPDN, meminta untuk dilanjutkan because license dia pun automatically expires apabila salah seorang partnership meninggal.* Jadi kami menulis kepada KPDN, dan *pihak KPDN memberi kami extension untuk mencari pengganti.* Jadi sebab itulah saya berjumpa dengan Jun, saya nak finalized, Gen-2 ini.

PP: Okay.

SP4: Tetapi pada hari tersebut, Pn Zuraini, datang menulis surat menyatakan *dia menarik diri, dia tidak berminat untuk menjalankan stesen itu.*

And at p 108 Rekod Rayuan Bahagian B:

PP: Setelah Allahyarham Hamid Baba meninggal dunia, Pn Zuraini telah memegang jawatan apa? ... En Joari cakap Pn Zuraini menguruskan stesen minyak tersebut, betul tak?

SP4: Sebagai Gen-2 lah.

PP: Dia sebagai Gen-2.

SP4: Dia apabila, masa kami menjalankan program Gen-2 ini, *anak dia bekerja di*

stesen, anak perlu bekerja di stesen sekurang-kurangnya 2 tahun. Jawatan kita nak tengok dia boleh mengambil alih sebagai retailer. Jadi, selalunya supaya anak itu bekerja di stesen semasa menjalani Gen-2 ini, dia selalu sebagai manager. Selalunya sebagai manager dan dia di beri empowerment oleh Sykt dia, Hasajaya untuk menguruskan pengurusan seolah-olah ianya sebagai seorang retailer ...

And at p 109 *rekod rayuan bahagian B*:

PP: Okay, fine. Setelah Allahyarham meninggal dunia, Pn Zuraini telah menjadi retailer untuk Sykt Hasajaya. Boleh saya katakan begitu tak?

SP4: Secara officialnya tidak. *Because kita tak appoint dia sebagai retailer. Dia tidak dilantik sebagai retailer … dan dia terus jalankan stesen itu, sebab kalau dia tak buat, tutuplah stesen itu … dan saya cakap kalau you tak mahu ambil Gen-2 ini, stesen ini tak boleh ada dah. Sebab by contract by law, the partnership dissolved, dan Pn Zuraini cakap, ya, dia tahu. En Saleh pun ada di situ pada hari itu.*

PP: ... Tadi encik cakap officially; secara rasminya encik belum lagi lantik dia sebagai retailer, betul tak?

SP4: *Syarikat tidak melantik dia sebagai retailer, ya.*

PP: Okay. Tapi boleh saya katakan bahawa selepas Allahyarham Hamid meninggal dunia, encik kata dia menguruskan stesen minyak, sehingga dia tender surat 3 May 2016. Boleh saya cakapkan bahawa dia telah mengambil tempat Allahyarham Hamid bin Baba di Sykt Hasajaya?

SP4: *Secara officialnya tidak. Sebab dalam Syarikat itu nama*

PP: Non official, ya. Okay

SP4: *Sebab dalam Syarikat itu nama Allahyarham Hamid dan En Saleh*

PP: Okay

SP4: *Dan dia hanya menguruskan supaya stesen itu tidak tutup.*

And in his cross-examination at p 118 *rekod rayuan bahagian B*:

PD: Jadi, selepas surat ini diberikan adakah lesen Sykt Hasajaya masih diteruskan ataupun ditamatkan?

SP4: Apabila saya mendapat surat ini of course saya terkejutlah dan saya meminta true confirmation dari puan Zuraini dan daripada Hasajaya untuk kita, sebab ini mengatakan bahawa dia tidak berminat so now we have to plan the closer of the station. *Bila dapat surat ini saya kena plankan macam mana saya nak tutup stesen ini.* Sebab saya tidak boleh tutup immediate kan nanti customer dan *KDN memang dia kalau ada kes begini dia suruh kita try to delay sikit supaya kita dapat mencari pengganti yang baru.* Jadi apabila saya menerima surat ini terus saya tak boleh buat apa dan *kami re-plan untuk arrange the closure lah of the station* so dia teruskan juga sebab kita memang tak tutup abruptly for the sake of the community.

PP: Jadi, soalan saya seterusnya yang *puan Zuraini operate menjalankan perniagaan*

Hasajaya selepas surat ini adalah tujuan untuk proses penutupan station sahaja betul ataupun tidak?

SP4: *Betul.*

PP: Jadi, sebagai proses biasa untuk program Gen-2 ini biasanya sekiranya seorang potential Gen-2 ini dah memenuhi segala syarat-syarat apa proses biasa yang Shell akan buat adakah Shell akan beri official letter?

SP4: Ya. Jika proses ini berjaya ditamatkan Shell akan mengeluarkan satu surat official letter of offer kepada Gen-2 tersebut dan sertakan syarat-syarat ... *Salah satu syarat lagi ialah dia kena buka business itu sole proprietorship dia kena kerja full time dan dia kena sign satu contract baru dengan Shell.*

PD: Jadi, sekiranya program Gen-2 ini confirm Shell akan keluarkan official letter tetapi Gen-2 itu *beroperasi secara sole proprietorship?*

SP4: *Ya, saya.*

PD: *Bukan lagi partnership yang dahulu, betul?*

SP4: *Takada, betul.*

[56] The fourth alleged fact not considered was the email which returned the monies held by Shell as security, received from Sykt Hasajaya, in this form: 50% to the plaintiff and 50% to the defendant. The plaintiff submitted that since the monies were returned to the defendant meant that the defendant was a partner of Sykt Hasajaya. However, in examination in chief, SP4 revealed that the payment was done under a Syariah Order. The exhibit itself (seen at p 214 of *rekod rayuan bahagian C*) shows that the payment is based on a Syariah Order to the defendant. The defendant is said by SP4 to have received the monies as beneficiary of the Abdul Hamid bin Baba. The security was returned because Sykt Hasajaya was dissolved on the death of Abdul Hamid bin Baba. The submission of the plaintiff is therefore devoid of merit.

CONCLUSION

[57] For the foregoing reasons, in my judgment, the plaintiff had failed to demonstrate that the trial judge who had seen and heard the witnesses and sufficiently evaluated all the evidence, both oral and documentary, had come to a finding that was plainly wrong, or had erred in principle, or had decided against the weight of evidence. I therefore, find no merit in law or fact that warrants an interference of the decision made by learned sessions court judge. The appeal is dismissed with costs.

Appeal dismissed.

Reported by Ashok Kumar